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Supreme Court, U.S.
FILED

No. (1) 071212 MAR 20 2008

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IN THE

Supreme Court of the United States

RICHARD ARIZPE

Petitioner

V.

MARY E. PETERS, SECRETARY,
U.S. DEPARTMENT OF TRANSPORTATION;
FEDERAL AVIATION ADMINISTRATION;
CARI M. DOMINGUEZ, CHAIRWOMAN,
UNITED STATES EQUAL OPPORTUNITY
COMMISSION

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

A. Considering the undisputed fact that Defendant failed to timely prosecute Motion for Leave to File Motion for More Definite Statement, and Motion to Dismiss, and 16 days later, a Motion for Leave to File Motion to Dismiss, rendering all Motions associated with the USDC granting Dismissal of the case to have been untimely prosecuted, how is Petitioner's Constitutional 14th Amendment right to the due process, and equal protection of the law preserved?

B. In a primary claim of employers retaliation in response to Title VII participation, via deliberate implementation of a Harassing Hostile Work Environment, the Record demonstrates, that Defendant not only failed to comply with this courts ruling in *Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)*, and, *Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998)*, regarding employers responsibility to investigate Harassing Hostile Work Environments, but in pretext, created the appearance as to have conducted four separate investigations, all of which were proven to be bogus, thus losing it's opportunity for an Affirmative Defense. The Defendant and the District Court used Rules 8 & 10 of FRCP to claim, and rule, respectively, of an inability to comprehend Plaintiffs claims and used FRCP Rule 12 to Dismiss. Can a Defendant whose Vicars knowingly conspired to circumvent the subject Sup. Crt. case law in order to conceal wrongdoing, while knowing that the

opportunity for an Affirmative Defense had long since been lost, be allowed to abuse FRCP Rules 8 & 10, in and of themselves, as a form of an Affirmative Defense? Does the loss of a Faragher & Ellerth Affirmative Defense preclude, and in turn, render as legally moot, any subsequent legal Motions to use FRCP Rules 8 & 10 as an Affirmative Defense?

C. With consideration of undisputed fact that in March of 1993, the FAA produced a memorandum specifically ordering that in litigation, *"[a]n employee may testify as to facts and may give opinion testimony only on behalf of the United States"*, in effect ordering all FAA witnesses to violate their own Sworn Oath of Office, mandated by Article VI of the Constitution, to *"[s]upport and defend the **Constitution** of the United States"*, Petitioner Motioned to Null, Void, and Correct the 3/11/93 FAA Memorandum. To date, the USDC, and Appeals Court provided no response to the Motion. Was Petitioner denied his Constitutional 14th Amendment Right of due process and equal protection of law when Defendant ordered material witnesses to testify *"only on behalf of the United States"*? Does the 3/11/93 FAA memorandum, which is to date still in effect, directly contradict and render invalid employees Article VI/SF-61 Oath of Office, to support and defend the Constitution of the U.S.A.?

D. When workplace retaliation is so severe, pervasive, lengthy, and malicious so as to directly, and adversely, impact the immediate family of Petitioner, do Spouse and siblings have standing for injuries within Title VII Retaliation Claims?

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V. BASIS FOR SUP. COURT JURISDICTION

The statutory provisions believed to confer upon the United States Supreme Court the jurisdiction to review on a Writ of Certiorari the judgments in Case No. SA-06-CA-0563 FB of the U.S.D.C., and, Appeal Case No. 07-50819 of the 5th Circuit Court; is the U.S. Constitution, Article III, Sec. 1 & 2, (See A61). This Writ will provide the necessary vehicle for the Supreme Court to implement it's appellate jurisdiction, by demonstrating the exceptional circumstances that warrant the exercise of the Court's discretionary powers, and as is demonstrated by the Judicial Record of case in reference, adequate relief cannot be obtained in any other form, or from any other court.

The U.S.D.C. for Western District of Texas provided jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, Dismissed Case No. SA-06-CA-0563 FB; the United States Court of Appeals for the Fifth Circuit, No. 07-50819, Affirmed.

VI. CONSTITUTION, STATUTES, and REGULATIONS in REVIEW

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VII. STATEMENT OF THE CASE

Beginning with DOT/FAA's first act of retaliation, on 9/25/96, Petitioner was repeatedly denied, for years thereafter, through until the final month of employment, the privilege/benefit to work a 10 hour Adjusted Work Schedule, as was continually allowed

to other similarly situated peer employees, that was presented as first evidence of Continuing Violation within EEO Complaint DOT 5-99-5061,[1] the DOT/FAA embarked on a decade long conspired scheme through multiple Vicars[2] of the Agency to affirmatively retaliate against Petitioner, Richard Arizpe, in reprisal for having performed the sworn responsibility and duty, in compliance with Article VI of the Constitution,[3] of contesting violations of Title VII Civil Rights[4] and Constitutional Statues of Law.

Retaliation included such unlawful acts as;

* destruction of documents pertinent to litigation;[5]
* unlawful official orders for witnesses to testify *"only on behalf of the United States"*[6];
* denial of Petitioner's ability to perform, if not for retaliation, what would have been Petitioners normal duties and responsibilities;[7]
* denial of multiple other privileges/benefits, for nearly a decade, such as denial of; Alternate Work Schedule, Flex-time, Telecommuting, Termination of

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[1] References are to Paginated Record unless otherwise designated. See Record at 115-116.

[2] "Vicarious Employer Liability for Unlawful Harassment" See Record at 95-109, 441.

[3] See Writ Appendix at A61

[4] See Writ Appendix at A62-A63

[5] See Writ Appendix at A68-A69; also found within Paginated Record at 46.

[6] See Writ Appendix at A70-A71; also found within Paginated Record at 54.

[7] See Record at 194-197, 663.

PCS, Leave Without Pay benefit/privilege, Workers Compensation claims...;

* deliberate destruction of Petitioners official work product[8] in order to wrongfully concoct less than superior work performance and deny monetary Superior Contribution Increases, SCI's, for years 2002/2003/&2005;

* after 30 years of faithful civil service, DOT/FAA issued Petitioners first unlawfully constructed disciplinary Reprimands in order to pressure employment termination;[9]

* the deliberate implementation of a Hostile Work Environment to such a degree of severity, pervasiveness, and malice, that it caused Petitioner the onset of a Medical Disability, ultimately placing Petitioner in harms way, culminating in the Petitioners Constructive Discharge.[10]

In the 9½ year period during the retaliation, Petitioner filed no less than 6 informal EEO Complaints,[11] of which only three were allowed by

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[8] See Record at 236-240.

[9] Claim that Reprimands were, in Continuing Violation, part of the Retaliation via Hostile Work Environment contained in EEO Complaint DOT-2006-20531-FAA-05 that was denied sub-summation into this instant Civil Action.

[10] Claim of Medical Disability and Constructive Discharge, in Continuing Violation, is part of the Retaliation via Hostile Work Environment EEO Complaint DOT-2006-20531-FAA-05 that was denied sub-summation into this instant Civil Action.

[11] Three Informal EEO Complaints were not allowed by DOT & EEOC to achieve Formal Status--See Record at 186-187; 209-221; & 232-234.

the Agency and the EEOC to achieve Formal status,[12] and of those three Formal EEO Complaints only one was allowed to go to an EEO Hearing;[13] and of the one EEO Complaint that was allowed to go to Hearing, only 3 out of the 7 original claims were accepted for EEO investigation; and of the 3 claims accepted for investigation, the Agency failed to Execute an Impartial and Appropriate Factual Record, as mandated by 29 CFR Part 1614.104 and the EEOC's own Management Directive, MD-110.[14] The EEOC ruled against Petitioner. Finally, as a direct result of the work place construction to force discharge, after receiving the first Letters of Reprimand of a 30 year career, Petitioner was forced, "Under Duress", to retire on March 31st of 2006. In response, Petitioner filed a final EEO Complaint DOT 2006-20531-FAA-05, primarily arguing Agency

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[12] Three Formal EEO Complaints—DOT 5-99-5061 See Record at 111-119; For DOT 2004-18147-FAA-05 See Record at 242-253; For DOT 2005-19872-FAA-05 See Record at 452-457.

[13] EEOC, after 5 years, without Hearing, Dismissed EEO Complaint DOT 5-99-5061-- See Record at 134-137. Petitioner Appealed to the EEOC demonstrating a blatant EEOC disregard for due process of law-- See Record at 138-164. (Cont.) CONTINUATION OF FOOTNOTE 13: EEO Formal Complaint DOT 2004-18147-FAA-05 did receive a Hearing-- See Record at 242-253; 261-319; 355-387. Petitioner filed an Appeal to the EEOC again demonstrating blatant disregard for due process.

EEO Formal Complaint DOT 2005-19872-FAA-05 received an immediate Agency Decision, without EEOC Participation, through which Petitioner included the subject Complaint with this instant suit. See Record at 452-462, 483-485.

[14] See Record at 404-405.

produced onset of Medical Disability, and Constructive Discharge, via a Hostile Work Environment. The Complaint is still in the Administrative Process, and was not allowed by the District Court to be subsumed within this instant Civil Action.[15]

Upon submission of this instant timely filed suit in District Court, Defendant, claiming an inability to understand the claim, was awarded the "rarely used" Motion to Dismiss of FRCP, and Petitioner has, in turn, been monetarily sanctioned by the District Court, to almost the exact amount of monies that Petitioner possessed in financial institutions on the same day that the Department of Justice filed Motions for monetary sanctions. Petitioner does not consider the acute correlation of funds available to Petitioner, with the DOJ total for monetary sanction, to be a coincidence.[16] Petitioner has also been banned from filing any new suits in Federal Court, unless first filing Motion for Leave to file such suits. The USDC for Western District of Texas, on 11/20/07, denied Petitioner's Motion for Leave to file a new Tort Claims Suit against the United States. The U. S. Court of Appeals advised Petitioner of more sanctions if a non-meritorious petition for rehearing *en banc* was filed with the Appeals Court. The DOJ is presently garnishing one fourth of Petitioners monthly retirement annuity.

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[15] See Record at 1037.

[16] See Record at 1050.

Ultimately, the facts on record of this instant case are that of an employer **Retaliating** against Petitioner for having participated in previous Title VII complaints. The Defendant and the USDC Magistrate Judge, as supported by the 5th Cir. Ct., have decided to portray the case as one of an "obviously upset" Petitioner trying to relitigate "stale claims" through "conclusory allegations".[17] Petitioner's claims of Retaliation, by and through the FACTS as are on record, prove the Courts *res judicata* opinion to be in error. The *res judicata* doctrine is a derivative of the 7th Amendment *"no fact tried by a jury shall be otherwise re-examined"* clause,[18] and as such, mandates a jury judgment of the premise case in order to be applied to subsequent cases. The violation of Title VII retaliatory statutes of law[19] committed by the Agency as demonstrated in the Record for this instant case, are totally separate, and apart, from any previous claims. The USDC and 5th Cir. Ct. have decided to analyze and rule on previous claims with a misapplied *res judicata* doctrine, instead of analyzing and ruling upon the retaliation claims that are separate and apart for this instant case.

VIII. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The U.S.D.C. for Western District of Texas provided jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

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[17] See Record at 842. Also See Writ Appendix at A50, A56.
[18] See Writ Appendix at A61.
[19] See Writ Appendix at A62-A64.

IX. REASONS FOR ALLOWANCE OF WRIT

From September of 1996, when the retaliation started, and through October of 2000, when official orders were issued from the highest levels of the FAA to commence implementation of a Harassing Hostile Work Environment against Petitioner, to the day of this instant Writ of Certiorari, the TRUTH of the reprisal claims as have been exhaustively presented by Petitioner, have been ignored. This Supreme Court is the final governmental entity available to allow the Petitioner the privilege of exercising the 1st Amendment Constitutional Right to *"petition the Government for a redress of Grievances."* This instant cause of action, as was the case for the two Civil Actions that make up the **Motive** for such reprisal, contain unanswered Summons, hence, how is it any different from what the forefathers of this Nation were suffering when the British Crown was denying the **right of redress** to its colonial entities? Surely the forefathers submitted their grievances in writing, only to be ignored without an answer, and suffer repeated injury. That was one of the complaints that started a revolutionary war. Does not a right of redress include an answer? Does the very definition of *redress* not also include an answer? Redress without an answer is meaningless. For the Defendant, with support of the courts to date, to claim ignorance of the ability to understand the simple claim of deliberate implementation of a Harassing Hostile Work Environment, is absurd.

Petitioner not only considers the acceptance of the Writ of Certiorari to be essential for implementation of Justice regarding the 1st Amendment right of redress;

* Petitioner, almost daily for 12 years during youth swore "Allegiance to the Flag, and the Republic for which it stands, ... One Indivisible Nation under GOD," ...with a commitment to "Liberty and Justice for All";

* Again, at risk of life itself, while serving as an infantryman, in combat, to prevent the spread of Communism in Vietnam, swore under oath to "Defend the Constitution of the United States of America";

*and again upon entering Federal Civil Service took an Oath of Office, in compliance with Article VI of our Constitution,[20] via Standard Form 61,[21] to "support and defend the Constitution of the United States against all enemies, foreign and domestic," bearing "true faith and allegiance".

Hence, Petitioner, Richard Arizpe, for most all of my life, have affirmatively committed to the support, and diligent defense, of our Nations Constitution, even to the point of risking my life for such a document. Petitioner's sworn oath of office made in November of 1975 contractually charged Petitioner with a duty to support and defend the Constitution of

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[20] See Writ Appendix at A61

[21] See Writ Appendix at A65-A67

the USA, and after Petitioner did exactly as charged, in return, was subjected to the most severe, pervasive, and malicious form of workplace retaliation, as proven, not by conclusory statements as labeled by the Magistrate Judge, but as legally demonstrated FACTS for this instant case, whereby no administrative process, or federal judicial process, to date, has joined Petitioner in support and defense of our Constitution. The Supreme Court is the only avenue left, through acceptance of this instant Writ of Certiorari, to hopefully correct the repeated injuries suffered by Petitioner, and by doing so, set straight the rights provided by the Constitution. As an issue associated with the questions at hand, how can it be that a Federal Civil Servant, who has sworn through an Oath of Office to support and defend the Constitution, subsequently, suffer humiliating, malicious retaliation, to the point of being unlawfully discharged, and monetarily sanctioned, for having performed the very duty and responsibility of contesting those who violated Constitutional Law, as was mandated in the Sworn Oath of Office?

A. Question of Failure to Timely Prosecute

The U. S. Court of Appeals for the 5th Circuit has made a decision in this instant case wherein it ruled in direct contradiction to its own previous ruling.

In *Irwin v. Veterans Administration et al; 5th Cir. No. 89-5867, US Sup. Crt. 12/3/90*; the courts

justified dismissing Plaintiff Irwin's case because of a failure to timely prosecute, however, in this instant case Petitioner has been denied the *"due process and equal protection of the law"*, as provided for in our Constitutions 14th Amendment,[22] when Defendant was allowed to pass for the exact same violations. Defendant's multiple violations of a failure to timely prosecute in this instant case is no different from *Irwin.* The USDC used the following rule to deny Petitioners 14th Amendment Right to the equal protection of law:

> Federal Rule of Civil Procedure 55(e) provides that "[n]o judgment by default shall be entered against the United States or ... an agency thereof *unless the claimant establishes a claim or right to relief by evidence satisfactory to the court*."[23] (emphasis added)

The material documented, and **Factual Evidence** is in abundance, as meticulously demonstrated in Appeal, and with premise of such compelling evidence, this Supreme Court should issue it's own judgment by default, by authority of U.S. Constitution, Article III, section 1 & 2; and hold Defendant liable for relief as was stated in timely issued Summons.[24]

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[22] See Writ Appendix at A62.

[23] See Writ Appendix at A28. B. Analysis –1. default judgment.

[24] See Record on Appeal No. 07-50819, Appellant's Brief at pgs. 14-20. For Summons-- See Record at 488-491, 495-502. Also, for Article III, See Writ Appendix at A61.

B. Question of Loss of Affirmative Defense

The U. S. Court of Appeals for the 5th Circuit has made a decision in this instant case wherein it ruled on an important federal question in a way that conflicts with relevant decisions of this court.

The claims of the suit as were plainly presented are simple:

> "**Because of Plaintiff's**: National Origin, Hispanic, Age DOB-12/29/1950, & Retaliation; **The Defendants**: Terminated Plaintiff's Employment via a Constructive Discharge; Failed to Promote Plaintiff; and Retaliated via Implementation of a Hostile Work Environment."[25]

In order to legally demonstrate severity and pervasiveness, and pass legal muster of a Hostile Work Environment, Petitioner proceeded to list a sampling of the Tangible Adverse Employment Actions suffered over a 9 year period.[26] The MOTIVE for the retaliation was Petitioners previous participation in Title VII issues.[27] The Defendant, the USDC, and the 5th Cir. Ct., seemingly ignored the

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[25] See Record at 652. This quote taken directly out of Court Ordered Amendment to Original Complaint. The same claims, only altered in the wording, is found in the Original Complaint-- See Record at 003. Also See Record at 872.

[26] See Record at 4-17, and again, as per Court Order at 655-671, & 686-705.

[27] See Record at 003, 653-654, & 685.

primary claim of RETALIATION via deliberate implementation of a Hostile Work Environment, and instead decided to project, and concentrate, on Petitioners previous participation in Title VII issues; using the misapplication of the doctrine of *res judicata;* determining previous claims to be "stale"; failure to exhaust administrative remedies, and finally, using Petitioners "dissatisfaction", or being "upset" with employer as an excuse to deny Petitioners Constitutional rights.[28] The USDC, and Appeals Court, failed to address the plain and simple claims as were presented by Petitioner in the exact method by which the USDC ordered, and as has been restated at the beginning of this subsection. It is irrelevant whether or not Petitioner is "dissatisfied", or "upset", with the unlawful actions of employer. What are relevant are the LAW, the TRUTH, and JUSTICE, and the fact that to date, multiple statutes of law have been violated by Defendant, and ignored by the courts, in this instant case.

If, *Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)*, and, *Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998)*, is to be upheld in the Federal workplace, with consideration that the EEOC went to considerable lengths to establish the case law of *Faragher & Ellerth*,[29] then it only stands to reason that if once the employer commits to deliberately, and unlawfully, circumvent such case law by not only failing to comply with the case law to investigate harassing hostile work environments, but

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[28] See Record at 517-526, 539-553, 610-626, 628-643, 723-746,
[29] See Record at 95-109.

deliberately, in pretext, create the appearance so as to have complied with such case law;[30] there is no greater violation of the case law's intent. The loss of an Affirmative Defense; even the use of FRCP Rules 8 & 10,[31] to assume ignorance of the claims, in and of itself, being used as such an Affirmative Defense, is inexcusable. In USDC, the Defendant filed approximately 250 pages of argument, and motions, in response to a case that the Defendant claims not to understand. A large proportion of which was Defendant's successful Motions to Sanction Petitioner. Defendant has abused FRCP Rules 8 & 10, as an Affirmative Defense, because to proceed with the case otherwise, with consideration of the FACTS on record rising to the level of perjury,[32] according to *Faragher & Ellerth*, means that Defendant has lost any Affirmative Defense.

There is a necessity for the Supreme Court to set precedent for all District Courts and the Federal Workplace, in cases of Loss of Affirmative Defense reference to *Faragher & Ellerth*, to first establish whether or not a Defendant has indeed lost Affirmative Defense, which in turn directly impacts any further prosecution of a case; even to the point of whether or not a Defendant can use the ignorance pleading of FRCP 8 &10. The fact is that the failure of an employer to comply with *Faragher & Ellerth*, occurs long before any Civil Action, and if violation of

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[30] See Record at 660-662.

[31] See Writ Appendix at A63-A64.

[32] See Record at 422-424.

such case law is factually demonstrated,[33] especially with sworn testimony proving perjury, as in this instant case, then the use of FRCP 8 & 10 become time barred and legally moot.

C. Question of Witness Tampering, and Ordering Witnesses to Violate Previous Sworn Oath of Office.

The U. S. Court of Appeals for the 5th Circuit has made a decision in this instant case wherein it has so far departed from the accepted course of judicial proceedings by sanctioning the lower court, as to call for an exercise of the Supreme Courts supervisory power on the issue of a Governmental entity making far reaching and unlawful policy to, in effect, subvert Justice.

In March of 1993, the FAA produced a memorandum specifically ordering that in litigation, *"[a]n employee may testify as to facts and may give opinion testimony only on behalf of the United States."* [34] The memorandum officially ordered any government witness to violate their own Sworn Oath of Office, via standard form SF-61,[35] which is in compliance with Article VI of the Constitution,[36] to *"[s]upport and defend the Constitution of the United States".* Petitioner Motioned to Null, Void, and

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[33] See Record at 660-662.
[34] See Writ Appendix at A70-A71.
[35] See Writ Appendix at A65-A67.
[36] See Writ Appendix at A61.

Correct the 3/11/93 FAA Memorandum.[37] The USDC provided no response to the Motion. The 5th Cir. Crt. also provided no response to the plea.[38] To date, Petitioner is still waiting for a ruling on the Motion.

D. Question of Reprisal Impact on Family of Petitioner.

This Supreme Court should itself decide this important question of federal law, and the U. S. Crt. of Appeals for the 5th Circuit has made a decision in this instant case wherein it ruled on an important federal question in a way that conflicts with relevant decisions of this court.

In *Burlington Northern and Santa Fe Railway Co. v. Sheila White, No. 05-259, 548 U.S., 2006;* this court unanimously established that injury from retaliation can extend beyond the workplace. In USDC Petitioner Motioned for inclusion of Spouse and two daughters who were directly, and adversely, impacted by the malicious retaliation suffered by Petitioner for a decade.[39] The USDC denied the Motion. Petitioner also included the claim in Appeal.[40] The Appeal Court ignored the issue.[41] Petitioner's immediate family, outside of God the

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[37] See Record at 859-864.

[38] See Record on Appeal No. 07-50819 at "Appellant's Brief", pgs. 8-9, & 21.

[39] See Record at 790-798.

[40] See Record on Appeal No. 07-50819, Appellant's Brief at 9, 22. Also See Record on Appeal No. 07-50819, "Motion to Amend Parties", dated 8/20/07.

[41] See Writ Appendix at A1-A5.

Father, is indeed most central to life itself. If workplace retaliation is so severe, pervasive, lengthy, and malicious so as to also adversely impact such immediate family life force, does the scope of Title VII retaliation encompass the injury imposed upon the family of the principle Plaintiff?

X. CONCLUSION

The USDC's Magistrate Judge was keenly aware of Petitioners three primary claims;

> *"Plaintiff alleged the FAA "[t]erminated Plaintiffs [e]mployment via a [c]onstructive [d]ischarge," failed to promote him, and "[h]arrassed Plaintiff via implementation of a [h]ostile [w]ork [e]nvironment."*[42]

Defendant's received Original complaint on 6/28/06. By the time that Defendant's filed their first pleading, a tardy Motion for More Definite Statement, on 8/29/06, it is clear that Defendant's were cognizant of the fact that the Retaliation claim of Hostile Work Environment was included within the six EEO Complaints, and that they knew exactly where to find the documented claims within the Original Complaint;

> *"Since Plaintiff has filed six separate administrative complaints of discrimination ..."*[43]

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[42] See Writ Appendix at A14-A15.

[43] See Record at 548 for quote. See Record at 111, 186, 209, 232, 242, 452 for EEO Complaints.

The Defendant's position, in a form of *ignoratio elenchi*, after committing perjury to conceal unlawful acts, combined with the USDC's Report and Recommendation by the Magistrate Judge in support of the inability to comprehend the Harassing Hostile Work Environment claim; which is supported by a multitude of Factual Tangible Adverse Employment Actions, is simply not plausible to a reasonable fact finder. It is obvious that short of U. S. Supreme Court intervention, Petitioner will find no Justice for the unconscionable, and egregious, violations of multiple statutes of law, including the denial to Petitioner of several Constitutional Rights; and there will be no resolution to the important questions presented to this Court.

As relief, Petitioner respectfully requests for the U. S. Supreme Court to exercise it's Article III Constitutional Authority over Law and Fact, and grant default judgment by executing enforcement of the Original Summons, including damages to Plaintiff and Family; or, In the Alternative, to grant Petitioner a Trial by Jury within a different District Court, outside of the 5th Circuit, preferably within the DC Federal Circuit.

Respectfully submitted,
March 19, 2008

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
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December 21, 2007
Charles R. Fulbruge III
Clerk

No. 07-50819
Summary Calendar

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FEB 14 2008
Clerk, U.S. District Court
Western District of Texas
By s/
Deputy Clerk

D.C. Docket No. 5:06-CV-563 FB

RICHARD ARIZPE,
Plaintiff-Appellant

v.

MARY E. PETERS,
Secretary, United States Department of Transportation, Federal Aviation Administration;
CARI M. DOMINGUEZ, Chairwoman, United States Equal Employment Opportunity Commission,

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio.

Before REAVLY, SMITH, BARKSDALE, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: FEB 12 2008

A True Copy Attest
Clerk, U.S. Court of Appeals , Fifth Circuit
By: s/ Rhonda Parker
Deputy
New Orleans, Louisiana FEB 12 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 21, 2007
Charles R. Fulbruge III
Clerk

No. 07-50819
Summary Calendar

RICHARD ARIZPE,

Plaintiff-Appellant,

v.

MARY E. PETERS,
Secretary, United States Department of Transportation, Federal Aviation Administration;
CARI M. DOMINGUEZ, Chairwoman, United States Equal Employment Opportunity Commission,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
No. 5:06-CV-563

No. 07-50819

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges. PER CURIAM:*

Richard Arizpe sued under title VII and the Age Discrimination in Employment Act. As the magistrate judge stated,

> [Plaintiff] is obviously upset with the circumstances surrounding his employment with defendant, as evidenced by the lawsuits he filed in 1998 and 2002 against the Department of Transportation and Federal Aviation Administration [footnote omitted]. Plaintiffs conclusory allegations and legal conclusions masquerading as factual conclusions, however, cannot suffice to prevent defendant's motion to dismiss in this case.

After reviewing the briefs and pertinent parts of the record and the applicable law, we affirm, essentially for the reasons stated by the magistrate judge in her comprehensive Report and Recommendation signed on January 12, 2007. We also conclude that Arizpe's argument that the district court's ruling is legally invalid because it listed Maria Cino as Acting Secretary of Transportation, rather than Mary Peters as Secretary of Transportation, is frivolous. *See* FED. R. CIV. P. 25(d) ("[A]ny misnomer not

affecting the parties' substantial rights must be disregarded."). Arizpe's other arguments are equally unavailing.

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
APR 20 2007
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
s/Rg
DEPUTY CLERK

RICHARD ARIZPE	§	
	§	
Plaintiff,	§	
VS.	§	
	§	
MARIA CINO, ActingSecretary, United States Department of Transportation, Federal Aviation Administration, CARI M. DOMINGUEZ, Chair, United States Equal Employment Opportunity Commission, and ALBERTO GONZALES, United States Attorney General, United States Department of Justice,	§	CIVIL ACTION NO. SA-06-CA-563-FB
	§	
Defendants,	§	

JUDGMENT

The Court considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the order Accepting Report and Recommendation of the United States

Magistrate Judge filed in this cause on this same date,

It is herby ORDERED, ADJUDGED and DECREED that the Report and Recommendation of the United States Magistrate Judge filed in this case on January 12, 2007 (docket #54), is ACCEPTED such that Defendant Secretary of Transportation's Motion to Dismiss (docket #37) is GRANTED and plaintiff's remaining claims in this case are DISMISSED WITH PREJUDICE; Plaintiff's Motion for Inclusion of Current Administrative EEO Complaint DOT-2006-20531-FAA-05 and Plaintiff's Motion for Court Order for DT to Complete Investigation, produce and ROI, and Agency Discrimination Determination of EEO Complaint DOT-2006-20531-FAA-05 (docket #50), and Plaintiff's Motion for Spouse and Two Daughters to Join as Additional Plaintiffs (docket #51), are DENIED, and defendant's request for sanctions is GRANTED such that plaintiff Arizpe is ENJOINED from filing in this Court any paper relating to his employment with the Department of Transportation unless he first obtains leave of this Court after demonstrating that his claim is timely, was exhausted (if applicable), and is not barred by res judicata, collateral estoppel or other legal doctrine. Defendant's Motion for Monetary Sanction remains pending.

It is so ORDERED.

SIGNED this 20th day of April, 2007.

s/ Fred Biery

FRED BIERY

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RICHARD ARIZPE Plaintiff, VS. MARIA CINO, Acting Secretary, United States Department of Transportation, Federal Aviation Administration, CARI M. DOMINGUEZ, Chair, United States Equal Employment Opportunity Commission, and ALBERTO GONZALES, United States Attorney General, United States Department of Justice, Defendants,	CIVIL ACTION NO. SA-06-CA-563-FB

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: Honorable Fred Biery
United States District Judge

Pursuant to the order of referral[1] in the above-styled and numbered cause of action to the undersigned United States Magistrate Judge and consistent with the authority vested in United States Magistrate Judges under the provisions of 28 U.S.C.§636(b) and rule 1 of the Local Rules for the Assignment of Duties to United States Magistrate Judges in the Western District of Texas, the following report is submitted for your review and consideration.

I. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

II. PROCEDURAL HISTORY

As discussed further below, plaintiff initiated this case on June 27, 2006, filing a complaint, since amended several times, raising claims, in general, of discrimination relating to plaintiff's government employment and the actions the Chair of the EEOC and the Attorney General of the United States regarding the handling of administrative complaints of discrimination. On November 14, 2006, defendant, the Secretary of Transportation, filed: (1) a Motion to dismiss, (2) response to plaintiffs second and third amendments to his original complaint, and (3) request that the Court reconsider the propriety of monetary sanctions against plaintiff.[2] On November

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[1] Docket no. 4.

[2] Docket no. 37.

17, 2006, the Court issued an Order mandating that plaintiff file any response to the motion to dismiss and request for monetary sanctions on or before December 5, 2006.[3] On November 27, 2006, plaintiff filed a document captioned "response to defendant's Motion to dismiss and other defendant responses and requests of docket (number) 37" and "request for enforcement of summons."[4] On December 5, 2006, plaintiff filed another response "to court's order, docket (number) 41 dated 11/27/06 and advisory to the clerk."[5] In January 2007, plaintiff filed a motion for inclusion of a current EEO complaint and investigation with the Instant case, and request that the disposition of this case be delayed until the proceedings can be joined, as well as a request that plaintiffs wife and two daughters be joined as additional

plaintiffs.[6]

The following litigation and procedural history is included to provide context for the Recommendations made to the District Judge in this Report:

Prior Litigation

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[3] Docket no. 41.
[4] Docket no. 42.
[5] Docket no. 44.
[6] Docket nos.50 and 51.

On July 9, 1998, plaintiff, then represented by counsel, filed a complaint against Rodney Slater, former Secretary of the Department of Transportation ("DOT"), and the Federal Aviation Administration ("FAA") alleging national origin discrimination in violation of Title VII in Connection with plaintiffs employment ("Arizpe I").[7] The allegations in Arizpe I arose out of a Reorganization of the FAA's Southwest Region that began in 1995.[8] Plaintiff alleged three Instances of discrimination:

> (1) defendants administratively reassigned him to Houston, denying him the Opportunity to keep his grade and pay and stay within the commuting distance of His previous place of employment in San Antonio; (2) defendants denied him the Opportunity to elect a downgrade to stay within commuting distance of San Antonio; and (3) defendants denied him the opportunity to substantially delay his Reporting date to his new work location in Houston.[9]

Subsequently, the District Court accepted the undersigned's report recommending defendants' Motion for summary judgment be granted and dismissed plaintiffs case with prejudice.[10] The

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[7] Arizpe v. Slater, et alia, SA-98-CA-610-0LG ("ArizpeI"), docket no. 1.

[8] Id. at 3.

[9] Id.,docket no. 24 at 2 (ReportandRecommendation).

[10] Id., docket no. 31.

Fifth Circuit Court of Appeals affirmed the District Court's judgment.[11]

On February 5, 2002, plaintiff filed a pro se complaint for himself and on behalf of fifteen other individuals against Norman Y. Mineta, former DOT secretary, and the FAA alleging Violations of Title VII and the ADEA in matters relating to employment ("ArizpeII").[12] After Comparing the allegations in Arizpe I with those in Arizpe II, the undersigned entered a report Recommending plaintiff's claims in Arizpe II be dismissed because they were barred by res judicata.[13] In particular, the events at issue in Arizpe II again challenged the FAA's 1995 Reorganization of the Southwest Region.[14] In addition, the report recommended dismissing Plaintiffs gender discrimination claim because

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[11] See id. docket no. 34.

[12] Arizpe v. Mineta, et alia, SA-02-CA-115-FB ("Arizpe II"), docket no. 1.

[13] Id., docket no. 27 (Report and Recommendation).

[14] Id. at 16-19. As summarized in the Report, plaintiff alleged the FAA: participated in a government "pilot program" designed to: (1) "imporve minority representation" in the FAA by correcting uneder-representation "at specific designated locales;" and (2) "produce a Reduction in Workforce ('RIF") without implementing the laws and regulations that would normally accompany a RIF." Plaintiffs claim that the FAA "used this re-alignment/reorganization as the vehicle or tool...to accomplish the performance end results initiatives" described in the pilot program and hereby caused unlawful "class discrimination" on the basis of "race, national origin, age, and gender."
Id. at 2 (quoting docket no. 1).

plaintiff had not exhausted administrative remedies and the Court lacked subject matter jurisdiction.[15] The claims of the fifteen other individuals were dismissed because plaintiff, who is not an attorney, could not sign pleadings on

their behalf.[16] The District Court accepted the report[17] and the Fifth Circuit affirmed the District Court's judgment.[18] The Fifth Circuit subsequently denied plaintiff's petition for a rehearing en banc.[19] The United States Supreme Court denied plaintiffs motion for leave to petition for writ of certiorari on January 12, 2004,[20] as well as plaintiffs petition for writ of mandamus and/or prohibition on October 12, 2004.[21]

Present Case

Original and Amended Complaint

Acting pro se, plaintiff sued Acting DOT Secretary Cino pursuant to Title VII and the ADEA.[22] Plaintiff submitted an extensive appendix of exhibits (defendant describes it as "a 423 Page Appendix")[23]

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[15] Id. At 19-20.
[16] Id. at 9-10.
[17] Id., docket no. 31.
[18] See Id., docket no. 38.
[19] Arizpe v. Mineta, No. 02-50948 (5th Cir. July 8, 2003).
[20] 540 U.S. 1101, 124 S. Ct. 1126 (2004,.
[21] 543 U.S. 923, 125 S. Ct. 313 (2004).
[22] Docket no. 1.
[23] Docket no. 14 at 2.

with the original complaint.[24] Although not presented on the pre-approved form, plaintiffs thirty-four page original complaint followed the complaint form available in the Western District in employment discrimination cases, restating and answering the form questions.

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Paragraph 4 of the original complaint alleged: "Defendant discriminated against Plaintiff. ..beginning on 9/25/96 through day of constructive discharge 3/31/06."[25] Paragraph 5 alleged: "Plaintiff filed charges against the defendant, DOT/FAA, with the [EEOC] charging defendant with the acts of discrimination...beginning on 4/26/99 through date of last Formal Complaint, Dated 10/31/05."[26] Paragraph 6 alleged the EEOC issued a notice of right to sue on April 12, 2006, in EEOC appeal no. 01A55927 and on April 17, 2006, in EEOC appeal no. 01A50328. DOT issued a notice of right to sue on April 3, 2006, for DOT complaint no. 2005-19872-DOT 05.[27]

Paragraph 7 covered approximately fourteen pages and included four subparagraphs with Parts a-v.[28] In paragraph 7, plaintiff alleged the FAA discriminated against him because of his national origin (Hispanic), "age (DOB-12/29/50)," and

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[24] Docket no. 1.

[25] Id. at 2 (citations to appendix omitted).

[26] Id. (citations to appendix omitted).

[27] Id. (citations to appendix omitted).

[28] Id. at 3-17.

retaliated against him for prior complaints Of discrimination.[29] Plaintiff alleged the FAA "[t]erminated Plaintiffs [e]mployment via a [c]onstructive [d]ischarge," failed to promote him, and "[h]arrassed Plaintiff via implementation of a [h]ostile [w]ork [e]nvironment."[30] In a section following the above list of alleged Discriminatory acts, plaintiff asserted retaliation based on his discovery of a "discriminatory Diversity Plan to use realignment as the vehicle to unlawfully relocate protected groups in an

effort to correct minority representation deficiencies at specific locales within the Airway Facilities."[31] Plaintiff appeared to allude to Arizpe II and allege the retaliation began on October 12, 2000, after he submitted a letter as class agent "to the highest level of the Chain of Command."[32] Plaintiff alleged the FAA restricted his movement out of the Houston area and Denied him access to his normal duties and responsibilities.[33] Additionally, plaintiff alleged the FAA conspired from "10/2000 to the day of Constructive Discharge, 3/31/06," to implement a hostile work environment.[34] Plaintiff appeared to contend that because the FAA was notified of the discriminatory acts and failed to comply with Ellerth

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[29] Id. at 3.
[30] Id.
[31] Id.
[32] Id.
[33] Id. at 3-4.
[34] Id. at 4.

and Faragher, the Agency had forfeited its affirmative defenses.[35]

Two subparagraphs in paragraph 7 were entitled "Other forms of Discrimination and Retaliation causing Tangible Adverse Employment Actions" and "Other forms of Discrimination And Retaliation...in direct violation, and dereliction, of their own written duties and responsibilities."[36] Parts a-v under these subparagraphs asserted a myriad of events occurring From 1995 through February, March, May, and June 2006.[37] The events were not discussed in chronological order and it was not clear whether plaintiff provided dates for all alleged

discriminatory and retaliatory acts or whether the lawsuit is based on all alleged acts.

Paragraph 8a merely stated "[t]he specific circumstances under which defendant, it's agent, or employees discriminated against plaintiff personally[] are specifically detailed within the informal and formal EEO complaints" found at a variety of places in the appendix.[38] In Paragraph 8b, plaintiff listed witnesses who would testify in support of his claims.[39] In paragraph 8c, which

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[35] Id.
[36] Id. at 4 and 14.
[37] Id. at 4-17.
[38] Id. at 17.
[39] Id. at 17-20.

consisted of approximately eleven pages, plaintiff listed twenty-seven categories of Documents that would support his allegations of discrimination.[40] Under each category, plaintiff listed citations to documents in the appendix.[41] Plaintiff also set forth subjective commentary about certain cited documents that might have included additional allegations of discrimination.[42]

Paragraph 9 reflected plaintiffs allegation that the FAA's discriminatory acts had continued after his alleged constructive discharge.[43] Plaintiff appeared to allege that the FAA was discriminating or retaliating against him through the Freedom of Information Act by "requesting that Plaintiff pay $2,867.61 for documents that would directly contradict the Agency's justification for Letter of Reprimand issued just prior to Plaintiffs Constructive Discharge."[44] In addition, plaintiff alleged the FAA was retaliating against him by delaying

annuity payments.[45] Finally, paragraph 10 stated plaintiffs formal EEO complaints were found in the appendix at exhibits F, N, and X.[46] Paragraph 10

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[40] Id. at 20-31.
[41] Id.
[42] Id.
[43] Id. at 31.
[44] Id.
[45] Id.
[46] Id.

also appeared to include additional allegations of discrimination.[47]

As relief, plaintiff sought "pecuniary, non-pecuniary, and future pecuniary damages for informal and formal complaints" located in the appendix at exhibits F, H, L, N, and X; injunctive orders; reinstatement of: sick leave, annual leave, compensatory leave, travel expenditures, LWOP hours, AWOL hours, overtime hours, attorney's fees, all with interest; any other appropriate costs; to make his spouse whole for loss of employment; and other relief for actions impacting his family.[48] Plaintiff requested back and front pay dating back to November 1995; re-employment with the FAA; and a promotion "to the corporate level achievement, as was evident in career path, going back to November 1995."[49]

Plaintiff's first amended complaint added allegations against Cari Dominguez, Chair, United States Equal Opportunity Commission ("EEOC"), and Alberto Gonzales, Attorney General, United States Department of Justice ("Attorney General").[50] In a Report signed on September 27, 2006, the undersigned recommended the claims against the Ms. Dominguez, the EEOC, the Attorney General, and the United States Department of Justice be dismissed with

[47] Id. at 32.
[48] Id. at 33.
[49] Id.
[50] See Id. and docket no. 9.

prejudice for lack of subject matter jurisdiction and for failure to state a claim for relief.[51]

On September 29, 2006, the undersigned granted defendant's motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e) in an "Order on Motion for More Definite Statement and Order to Show Cause."[52] The Order detailed the information that was required in a subsequent pleading in order for plaintiff to comply with federal pleading requirements and was informed that his failure to comply may result in the dismissal of this case.[53] Specifically, the Court ordered plaintiff to file a second amended complaint and "reorganize and replead the information provided in paragraph 7 and the commentary provided in paragraph 8c of the original complaint."[54] Additionally, the Court ordered plaintiff to "show>10

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[51] Docket no. 22.

[52] Docket no. 26.

[53] Id.

[54] The Order required the following of plaintiff: (1) to provide a short and plain statement of each claim he asserts against the FAA, and the Court noted "neither the FAA or the Court should be required to sort through plaintiffs allegations" as set forth in the original and first amended complaint in an effort to identify those that pertain only to the FAA; (2) to provide a clearly identified subsection for each cause of action asserted against the FAA; and (3) within each subsection, to state the basis of the Court's jurisdiction and provide a short and plain statement of each alleged discriminatory or retaliatory act that supported the elements of the particular cause of action, including, for example, providing: names of persons involved in the act; exactly what occurred and when; why plaintiff believed the act was discriminatory or retaliatory; when plaintiff first learned of the discrimination or retaliation; whether plaintiff contacted an

cause" why: (1) claims based on allegations of discrimination occurring from 1995 to February 5, 2002, when Arizpe II was filed, should not be dismissed as barred by the doctrine of res judicata because they have already been or could have been adjudicated in Arizpe I or Arizpe II; (2) claims based on alleged acts of discrimination and retaliation that were not raised with an EEO counselor or in the EEO charges of discrimination filed in April 1999, May 2003, or October 2005 should not be dismissed as untimely or for failure to exhaust administrative remedies; and (3) claims based on alleged discrimination or retaliation occurring after October 2005, including constructive discharge, should not be

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EEO counselor about the act and when; whether the discriminatory act was included in a formal EEO charge of discrimination and, if so, the EEO charge number. The Court cautioned plaintiff that merely stating the an alleged act amounted to a "continuing violation" would be a conclusory statement that would not support a claim for relief. Plaintiff was required to briefly explain how each alleged act of retaliation satisfied the requirements of the continuing violation theory. Further, plaintiff was warned that simply citing to documents in the appendix did not state a claim and he should eliminate all citations to the appendix, except for citations to the exhibit numbers for his formal EEO charges of discrimination and notices of right to sue. Finally, plaintiff was ordered not to reassert in the second amended complaint claims he asserted in the original and first amended complaint against defendants Cari Dominguez, the EEOC, Attorney General Gonzales, or the DOJ, who had been dismissed from the case. Id. at 14-15.

dismissed for failure to exhaust administrative remedies.[55]

Second and Third Amended Complaints

On October 16, 2006, plaintiff filed a second amendment,[56] and on October 26, 2006, plaintiff filed a third amendment.[57] On November 3, 2006, the Court entered a scheduling order, which, among other things, set an ADR report deadline of December 15, 2006, and a dispositive

motion deadline of April 30, 2007.[58] Also on November 3, 2006, the District Judge entered an Order accepting the findings of the undersigned's

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[55] Id. at 15. In addition, to the extent included in plaintiffs second amended complaint, plaintiff was required to explain the basis of the Court's jurisdiction over claims the FAA: committed criminal acts by destroying critical evidence; submitted falsified documents during litigation; conducted "bogus" investigations; violated 29 C.F .R. § 1614.104; and concealed information by violating the Freedom of Information Act. Id. at 15-16. Plaintiff was also ordered to explain why the Court has jurisdiction over his claim the FAA "failed to comply with the Federal Employees Compensation Act, Office of Workers Compensation Programs, OWCP" which plaintiff alleges is on appeal with the Department of Labor. Id. at 16. Finally, to the extent plaintiff was seeking that his "Spouse be also made whole reference to loss of employment," plaintiff was required to explain why his wife had standing to participate in this lawsuit and why the Court had jurisdiction to consider such a request. Id.

[56] Docket no. 30.

[57] Docket no. 34.

[58] Docket no. 35.

September 27, 2006 Report and Recommendation, and dismissed the Attorney General and the EEOC from the litigation.[59] Thus, Maria Cino, acting secretary, U.S. Department of Transportation /Federal Aviation Administration, is the only remaining defendant in the case.

On November 14, 2006, defendant filed a "motion to dismiss, response to plaintiffs second and third amendments to original complaint, and request for court to reconsider propriety of monetary sanctions against plaintiff."[60] Defendant maintains that plaintiff s second and third amendments fail to comply with the Court's order requiring plaintiff to provide a more definite statement of his proposed claims.[61] Specifically, defendant argues the Court "provided plaintiff with an explicit roadmap detailing how he needed to correct the myriad pleading deficiencies contained in his original complaint," plaintiff "failed to comply with the Court's Order and the Federal Rules of Civil Procedure," and plaintiff "has again presented the Court with a jumble of allegations which are nearly impossible to decipher."[62] On November 27, 2006, the Court issued an Order stating, among other things, that plaintiff "must file any response to the motion to dismiss and request for monetary sanctions on or before December 5, 2006."[63] Plaintiff filed [pg. 12]

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[59] Docket no. 36.
[60] Docket no. 37.
[61] Id. (referring to docket no. 26).
[62] Id. at 1.
[63] Docket no. 41 at 2.

responses on November 27, 2006,[64] and December 5, 2006.[65] On November 30, 2006, defendant filed a "motion for leave to consider motion to dismiss and response to plaintiffs request for enforcement of summons."[66]

III. ISSUE

Whether plaintiff's remaining claims against Maria Cino, Acting Secretary of Transportation/Federal Aviation Administration should be dismissed because plaintiff has failed to state a claim for which relief may be granted.

IV. STANDARDS FOR MOTIONS TO DISMISS

A. Fed. R. Civ. P. 12(b)(6)

Under Rule 12(b)(6), Fed. R. Civ. P., plaintiff must state a claim upon which relief can be granted or the complaint may be dismissed with prejudice as a matter of law. A motion to dismiss under Rule

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[64] Docket no. 42. Defendant named the pleading "response to defendant's motion to dismiss and other defendant responses and requests of docket 37; and plaintiffs request for enforcement of summons." Plaintiff states that defendant has "failed to timely prosecute an answer to the summons" because, according to plaintiff, defendant had until November 13, 2006 to file an answer to plaintiffs third amended complaint and did not file a responsive pleading until November 14, 2006. Id. at 1-2.

[65] Docket no. 44. Defendant named the second responsive pleading "plaintiffs response to court's order, docket 41 dated 11/27/06; and advisory to the clerk."

[66] Docket no. 43.

12(b)(6) "is viewed with disfavor and is rarely granted."[67] When considering a motion to dismiss for failure to state a claim, all factual allegations in the complaint must be

taken as true and construed favorably to the plaintiff.[68] The United States Supreme Court has elaborated:

> Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be proved consistent with the allegations," a claim must be dismissed, without regard to whether it is based on an outlandish

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[67] Kaiser Aluminum & Chern. Sales, Inc. v. Avondale, 677 F.2d 1045, 1050 (5th Cir.), cert. denied, 459 U.S. 1105, 103 S.Ct. 729 (1982) (quoted in Capital Parks, Inc. v. Southeastern Advertising & Sales Sys., Inc., 864 F.Supp. 14, 15 (W.D. Tex. 1993), affirmed, 30 F.3d 627 (5th Cir. 1994)).

[68] Fernandez-Montez v. Allied Pilots Assoc., 987 F.2d 278,284 (5th Cir. 1993). See Capital Parks, Inc., 30 F.3d at 629 ("A court's decision to dismiss for failure to state a claim may be upheld 'only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.' Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc., 804 F.2d 879,881 (5th Cir. 1986).") See also O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985).

> legal theory or on a close but ultimately unavailing one.[69]

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[70] Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.[71] This is a rigorous standard, but subsumed within it is the requirement that a plaintiff state its case with enough clarity to enable the court and the opposing party to determine whether a claim is alleged.[72]

V. ARGUMENTS AND CONCLUSIONS OF LAW

A. Summary of Arguments

Defendant has moved to dismiss, claiming plaintiff has not complied with the Court's September 29, 2006 Order, and arguing plaintiff has failed to state a viable claim for relief.[73] Defendant

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[69] Neitzke v. Williams, 490 U.S. 319,327,109 S. Ct. 1827,2232 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73,104 S. Ct. 2229, 2232 (1984)).

[70] Conley v. Gibson, 355 U.S. 41,45-46,78 S.Ct. 99,102 (1957).

[71] Jefferson v. Lead Indus. Ass'n, Inc., 1 06 F.3d 1245, 1250 (5th Cir. 1997); Tuchman v. DSC Communications Corp., 14 F.3d 1061,1067 (5th Cir. 1994); Fernandez-Montes, 987 F.2d at 284.

[72] Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989).

[73] Docket no. 37.

provides a detailed explanation of how plaintiffs second and third "amendments" do not comply with the Court's previous Order or the Federal Rules of Civil Procedure.[74] Additionally, defendant argues that plaintiffs response to the show cause Order is insufficient.[75] Further, defendant maintains that plaintiff, "by his actions in continuing to assert claims which have been finally dismissed, by his actions in disobeying the Court's Orders with respect to pleading his case, by his actions in asserting frivolous claims, and by his actions in refusing to provide specific information requested by the Court ... has demonstrated that he should be subject to monetary sanctions, and/or other sanctions to prevent further waste of resources and expense to the taxpayers."[76]

In plaintiff s first response, he maintains his second and third amendments make his claims against defendant clear.[77] Plaintiff continues by arguing the "true problem" arose from "the DOT/FAA deliberately" violating "the 1st Article, Sec. 9; the Civil Rights Act of 1866; the 13th Constitutional Amendment; the 1964 Civil Rights Act; and U.S. Supreme Court case law of

Jones v. Alfred H. Mayer (1968); when it decided to migrate it's own employees based on surname, racial

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[74] Id. at 3-19.
[75] Id. at 20-23.
[76] Id. at 24.
[77] Id. at 2-3.

designation, national origin, gender, and age ... in a devious conspiracy to project the appearance as to have complied with Affirmative Action, EEO, and Diversity initiative, while simultaneously awarding it's managers with monetary bonuses for such unlawful acts."[78] Plaintiff also claims defendant has "failed to timely prosecute an answer, or a motion to dismiss."[79]

In his second response, plaintiff argues defendant's motion to dismiss, "as an alternative to producing an answer to a summons" in this case is "in effect" an affirmative defense.[80] Plaintiff continues by claiming two Supreme Court opinions have found "the use of any affirmative defense is no longer an option."[81] Plaintiff argues defendant's motion to dismiss wastes taxpayer money because defendant no longer has "the authority to affirmatively defend unlawful actions upon which ... defendant took specific actions to conceal, and project an appearance as to have complied with Faragher & Ellerth, in pretext of further discrimination."[82] Nevertheless, according to plaintiff, defendant "provided sufficient argument" in its motion to dismiss "to demonstrate to the court" that ... "a jury is the only means by which such questions

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[78] Id. at 3. The Court notes that this is essentially the same allegation plaintiff made in his previous lawsuits against the DOT and FAA.

[79] Id. at 2.

[80] Docket no. 44 at 2.

[81] Id. at 2-3.

[82] Id. at 3.

can be addressed."[83]

B. Analysis

Plaintiff's responses, to the extent they address the merits of defendant's motion to dismiss, essentially rely on the following two arguments: 1) the motion to dismiss fails because defendant failed to properly respond to a Court Order with regard to its responsive pleading to plaintiff's third amendment, therefore making default judgment in favor of plaintiff appropriate, and 2) the motion to dismiss fails because plaintiff's second and third amendments comply with the Federal Rules of Civil Procedure and adequately address all pleading deficiencies addressed by this Court in prior Orders.

1. default judgment

Plaintiff's argument regarding his entitlement to default judgment is without merit. Federal Rule of Civil Procedure 55(e) provides that "[n]o judgment by default shall be entered against the United States or ... an agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court."[84] The record in this case shows defendant has participated in the defense of this lawsuit. Additionally, defendant is not required to file an answer at this time because Rule 12(e)

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[83] Id. The Court notes that "sufficient argument" from a moving party on a motion to dismiss is not a ground for denial of the motion.

[84] FED. R. CIV. P. 55(e).

states that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a

responsive pleading."[85] Defendant filed its motion for a more definite statement on August 29, 2006, the motion was granted on September 29, 2006, and plaintiff was ordered to show cause why certain claims should not be dismissed and to file a second amended complaint no later than October 16, 2006.[86] Plaintiff filed his second amended complaint on October 16, 2006, and his third amended complaint on October 26, 2006. Nevertheless, defendant acknowledges its pleading was filed one day late, apologizes for the oversight and requests the Court's indulgence. The Court finds, given the lack of "satisfactory" evidence and plaintiff's failure to show prejudice from the one day late filing, that default judgment is not appropriate against an agency of the United States government in this case.

2. second and third amended complaints

Defendant's motion to dismiss should be considered on its merits because plaintiff's second and third amendments are not in compliance with the Court's Order of September 29, 2006, and are not in compliance with the Federal Rules of Civil

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[85] Fed. R. CIV. P. 12(e).

[86] Docket nos. 14 and 26.

Procedure. Plaintiff has not presented one unified document to review, instead requesting that the Court sort through his original complaint for paragraphs 1-6 of allegations, pages 5-12 of his aborted second amendment for paragraphs 7a.-7g. of allegations, pages 3-5 of his third amendment for paragraphs 7h. and 7k., pages 14-15 of the second amendment for paragraph 7i., pages 16-21 of the second amendment for paragraphs 7l.-7r., and again to the third amendment for paragraphs 7w.-7gg. Plaintiff apparently maintains he has over twenty-five separate claims against the FAA, based solely on the lettering of his complaints. On their face, plaintiff's attempted amendments

do not present a short and plain statement of claims in violation of this Court's Order and the Federal Rules of Civil Procedure. In fairness to the pro se litigant in this case, however, the Court will review all of plaintiffs allegations in the second and third amendments and give a brief description of how plaintiff has failed to comply in this case.

The following deficiencies are still present in plaintiffs pleadings:

a. paragraph 7a of the second amended complaint

In this subsection, entitled "°"DOT/FAA denied plaintiff 10 hour adjusted work schedule, AWS, Benefit/Privilege," plaintiff fails to explain why this

claim is not barred by the doctrine of res judicata, in violation of the Court's show cause Order. Additionally, plaintiff fails to state whether and when he contacted an EEO counselor regarding his claim, also in violation of the Court's Order. Finally, plaintiff fails to state when he learned of the claim, also in violation of the Court's Order.[87]

b. paragraph 7b of the second amended complaint

In this subsection, entitled "DOT/FAA denied plaintiff telecommuting benefit/privilege,"

plaintiff refers to his appendix, in violation of the Court's Order,[88] fails to state whether or when he

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[87] See docket no. 26 at 14. Paragraph 3 of the Order's conclusion states: [w]ithin each subsection, plaintiff must state the basis of the Court's jurisdiction and shall provide a short and plain statement of each alleged discriminatory or retaliatory act that supports the elements of the particular cause of action, including information such as: names of persons involved in the act, exactly what occurred and when, why plaintiff believes the act was discriminatory or retaliatory, when plaintiff first learned of the discrimination or retaliation, whether plaintiff contacted an EEO counselor about the act and when, whether the discriminatory act was included in a formal EEO charge of discrimination and, if so, the EEO charge number. Each alleged discriminatory or retaliatory act must be stated separately and should not be repeated in the same subsection. Id.

[88] Paragraph 5 of the Order's conclusion states: [p]laintiff must understand that simply citing to documents in the appendix does not state a claim. Plaintiff should eliminate all citations to the appendix, except for citations to the exhibit numbers for his formal EEO charges of discrimination and notices of right to

contacted an EEO Counselor, and fails to explain why the alleged denial of telecommuting privileges is discriminatory or retaliatory, in violation of the Court's Order. Additionally, plaintiff fails to state when he first learned of this claim and his allegations fail to state a claim for relief because denial of telecommuting privileges is not an adverse employment action. Plaintiff also fails to explain why this claim is not barred by res judicata and fails to explain how this claim could satisfy the continuing violation doctrine, in violation of the Court's Order.[89]

c. paragraph 7c of the second amended complaint

In this subsection, entitled "DOT/FAA denied permanent change of station, PCS, benefit/privilege," plaintiff refers to his appendix, fails to state when he first learned of this claim, and fails to state whether or when he contacted an EEO Counselor. Additionally, plaintiff fails to explain why the denial

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sue, and, as addressed, provide a short and plain statement of each claim against the FAA. Id. at 14-15.

[89] Paragraph 4 of the Order's conclusion states: [i]f plaintiff did not contact an EEO counselor or file a formal EEO charge of discrimination regarding a particular discriminatory or retaliatory act, plaintiff must provide a short and plain statement of how the act satisfies the requirements of the continuing violation doctrine. To be clear, merely stating the act is a continuing violation is a conclusory statement that will not support a claim for relief. Plaintiff must briefly explain how the alleged act satisfies the requirements of a continuing violation. Id. at 14.

of the PCS benefit was discriminatory or retaliatory and fails to state how this claim could satisfy the continuing violation doctrine. Finally, plaintiff fails to

explain why this claim is not barred by res judicata.

d. paragraph 7d of the second amended complaint

In this subsection, entitled "DOT/FAA denied reasonable amount of official time/29 CFR Part 1614.605(b)," plaintiff refers to his appendix, fails to state when he first learned of this claim, and fails to state whether or when he contacted an EEO Counselor. Plaintiff also does not explain why the denial of official time was discriminatory or retaliatory, and what the legal basis is for this alleged right. Finally, plaintiff fails to state how this claim could satisfy the continuing violation doctrine and does not explain why the claim is not barred by res judicata.

e. paragraph 7e of the second amended complaint

In this subsection, entitled "DOT/FAA intentional spoliation of critical material evidence," plaintiff fails to state when he first learned of this claim, does not state whether or when he contacted an EEO Counselor, and fails to explain and cite supporting authority for how the alleged destruction of evidence states a claim for discrimination or

retaliation rather than, possibly, a claim under the Federal Tort Claims Act, Plaintiff also has not stated a claim for relief because all of his claims for class-based relief were denied, and he fails to explain how the alleged destroyed evidence would advance his individual disparate treatment claims. Finally, plaintiff does not explain how this claim could satisfy the continuing violation doctrine and fails to explain why the claim is not barred by res judicata.

f. paragraph 7f of the second amended complaint

In this subsection, entitled "DOT/FAA produced falsified documents during litigation," plaintiff fails to state when he first learned of this claim and does not state whether or when he contacted an EEO Counselor. Additionally, plaintiff does not provide a short and plain statement

of this claim, and never explains how and why the one document referenced was false. Plaintiff also refers to his appendix and fails to explain how this claim could satisfy the continuing violation doctrine. Plaintiff does not explain and cite supporting authority for how the alleged presentation of falsified documents states a claim for discrimination or retaliation.[90] Finally, plaintiff again fails to explain why this claim is not barred by res judicata.

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[90] Additionally, the FAA's liability under Title VII should not be based on actions taken in its investigative capacity rather than its employment capacity.

g. paragraph 7g of the second amended complaint

In this subsection, entitled "DOT/FAA & Accountability Board violation of S. Crt. Law," plaintiff fails to provide a short and plain statement of his claim, fails to state when he first learned of this claim, and does not state whether or when he contacted an EEO Counselor. Additionally, plaintiff fails to explain how the former Secretaries of Transportation should be individually accountable for his individual claim and fails to explain how the alleged conduct in allegedly failing to fully investigate his complaints was discriminatory or retaliatory. Plaintiff also does not state a claim for which relief may be granted because the conduct described involves investigative acts by the FAA, rather than employment acts by the Agency. The Court concurs with defendant's assessment that if the courts were to recognize such a claim, the rational response of federal agencies would be to refuse to investigate any harassment or discrimination claims because, according to plaintiff in this case, failure to adequately investigate a harassment claim can give rise to liability separate and independent from the employer's conduct as an employer. Even assuming the FAA did not comply with Faragher and Ellerth, such to preserve the affirmative defense to supervisory sexual harassment, no such affirmative

defense has been plead in this case, and the inability of the FAA to assert the affirmative defense cannot and does not give rise to a separate claim for liability. Finally, this claim is redundant of claims raised by plaintiff in several other subsections, including 7k. and 7bb., in violation the Court's Order and Rule 10, plaintiff does not explain how this claim could satisfy the continuing violation doctrine, and he fails to explain why this claim is not barred by res judicata.

h. paragraph 7h of the third amended complaint[91]

In this subsection, entitled "DOT/FAA deliberately prevented plaintiff from performance of normal duties and responsibilities, resulting in denial of SCI benefits for 2002, 2003, 2005," plaintiff fails to provide a short and plain statement of his claim and does not provide names of the specific individuals allegedly responsible for the claimed discrimination and retaliation, in violation of the Court's Order. Additionally, plaintiff fails to explain

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[91] Plaintiffs pleadings do not make clear whether he intends for the third amendment to completely supercede his second amendment, which was his October 16, 2006 effort to comply with the Court's Order. The third amendment and second amendment both contain paragraph 7g. with the same heading, but with different language. In places where the headings of the claim paragraphs are identical in the second and third amendments, the Court will assume the third amendment supercedes the second, and will address only the third amendment.

exactly what occurred and when, he does not explain in what way the conduct alleged was discriminatory or retaliatory, and he fails to state when he first learned of the alleged discrimination or retaliation. Finally, plaintiff does not explain why this claim is not barred by res judicata.

I. paragraph 7i of the second amended complaint

In this subsection, entitled "DOT/FAA denied plaintiff access to direct evidence of discrimination," plaintiff fails to state when he first learned of the alleged discrimination or retaliation, does not state whether or when he contacted an EEO Counselor with respect to this

claim, and fails to state whether this is a separate and independent claim, or merely direct evidence in support of his claim of hostile work environment. Plaintiff also reiterates problems with the investigation of his claim, in violation of the Court's Order. Plaintiff does not explain how the alleged conduct was itself an act of discrimination or retaliation, and he does not explain how this claim could satisfy the continuing violation doctrine. Again, plaintiff fails to state a claim upon which relief may be granted because the conduct described involves investigative acts by the FAA, rather than employment acts. Finally, plaintiff fails to explain why this claim is not barred by res judicata.

j. paragraph 7k[92] of the third amended complaint

In this subsection, entitled "DOT/FAA deliberate implementation of an unlawful hostile work environment," plaintiff fails to provide a short and plain statement of his claim, he cites numerous times to his appendix, and he fails to explain why the conduct alleged is discriminatory or retaliatory. Plaintiff fails to state a claim upon which relief may be granted because in order to state a viable hostile work environment claim, plaintiff must do more than allege that he was "treated badly" as a Mexican-American with prior EEO activity. Plaintiff also must allege the specific conduct in question was offensive because of his protected characteristics. Plaintiff also fails to state a claim because his theory of a hostile work environment apparently rests solely on the allegation that the FAA was motivated by retaliation, and the Fifth Circuit Court of Appeals has not explicitly recognized a cause of action for a retaliatory work environment.

Additionally, plaintiff fails to state a claim for which relief may be granted because the

conduct described involves investigative acts by the FAA, rather than employment acts. Plaintiff also fails to state a claim for which relief may be granted

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[92] No substantive allegations are meant to be included in paragraph 7j. See docket no. 30 at 15.

because the Court has already addressed, and rejected, plaintiff's allegation of a 14th Amendment violation.[93] Plaintiff does not state if this claim was previously included in one of his EEO charges, fails to state when he learned of this claim, fails to state when or whether he ever contacted an EEO Counselor regarding his claim, and does not state whether or how this claim can satisfy the continuing violation doctrine.

k. paragraph 7l of the second amended complaint

In this subsection, entitled "DOT/FAA subversion of OWCP claims," plaintiff does not explain why the conduct alleged is discriminatory or retaliatory, he fails to state when he learned of this claim, and he fails to state when or whether he ever contacted an EEO counselor regarding the claim. Additionally, plaintiff fails to state whether or how this claim can satisfy the continuing violation doctrine and does not explain why the claim is not barred by res judicata. Finally, plaintiff fails to explain why this claim is not barred by the Federal Employees Compensation Act, and how it states a claim for relief under Title VII.

l. paragraph 7m of the second amended complaint

In this subsection, entitled "DOT/FAA failed to produce an impartial and factual record," plaintiff

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[93] See docket nos. 22 and 36.

fails to state when he learned of this claim, does not state when or whether he ever contacted an EEO counselor regarding this claim, and fails to state whether or how this claim can satisfy the continuing violation doctrine. Further, plaintiff does not explain why this claim is not barred by res judicata and fails to explain how the DOT and FAA can be liable under Title VII

for actions taken in their investigative capacity, rather than their employment capacity. The claim is also redundant of paragraph 7k.

m. paragraph 7n of the second amended complaint

In this subsection, entitled "DOT/FAA destroyed government records," plaintiff cites to the appendix, fails to state when he learned of this claim, and fails to state when or whether he ever contacted an EEO Counselor regarding this claim. Plaintiff fails to state whether or how this claim can satisfy the continuing violation doctrine and does not explain why this claim is not barred by res judicata. Finally, plaintiff fails to explain how the DOT and FAA can be held liable under Title VII for actions taken in their investigative, rather than employment, capacity.[94]

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[94] The Court notes that this claim is also redundant of paragraphs 7e. and 7i.

n. paragraph 7o of the second amended complaint

In this subsection, entitled "DOT/FAA concealed government documents," plaintiff fails to state when he learned of this claim, fails to state when or whether he ever contacted an EEO counselor regarding this claim, and does not state whether or how this claim can satisfy the continuing violation doctrine. Plaintiff also fails to explain how the DOT and FAA can be held liable under Title VII for actions taken in their investigative, rather than employment, capacity. Plaintiff also does not explain why this claim is not barred by res judicata.[95]

o. paragraph 7p of the second amended complaint

In this subsection, entitled "DOT/FAA denial of LWOP benefit/privilege in order to construct frivolous disciplinary actions," plaintiff fails to state when he learned of this claim, fails to state when or whether he ever contacted an EEO Counselor regarding this claim, and does

not state whether or how this claim can satisfy the continuing violation doctrine. Additionally, plaintiff does not explain why this claim is not barred by res

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[95] The Court notes that this claim is also redundant of paragraphs 7e., 7i., and 7k. 26

judicata. Finally, plaintiff fails to explain why the alleged conduct was discriminatory or retaliatory.[96]

p. paragraph 7q of the second amended complaint

In this subsection, entitled "DOT/FAA denial of material evidence related to letters of reprimand," plaintiff improperly cites to his appendix and fails to state when he learned of this claim. Plaintiff also fails to state when or whether he ever contacted an EEO Counselor regarding this claim and whether or how this claim can satisfy the continuing violation doctrine. Finally, plaintiff does not state whether this particular claim, rather than a general claim for the alleged creation of a hostile work environment, was ever the subject of one of his EEO complaints, and plaintiff fails to explain how the alleged conduct described was discriminatory or retaliatory and why it is a violation of Title VII.

q. paragraph 7r of the second amended complaint and paragraph 7w[97] of the third amended complaint

In these subsections, both entitled "DOT/FAA was deliberately indifferent to safety issues associated with HWE," the paragraphs are

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[96] The Court notes that this claim is also redundant of paragraph 7 d.

[97] No subparagraphs 7s., 1., U., or v. are included in either the Second or Third Amendments.

redundant, plaintiff fails to explain how the alleged conduct was discriminatory or retaliatory, and does not state how it is a violation of Title VII.[98] Plaintiff also fails to state when he learned of this claim and does not state when or whether he

ever contacted an EEO Counselor regarding this claim. Finally, plaintiff does not state whether or how this claim can satisfy the continuing violation doctrine and fails to explain why this claim is not barred by res judicata.

r. paragraph 7x of the third amended complaint

In this subsection, entitled "DOT/FAA officials perjured themselves in sworn testimony," plaintiff improperly cites to his appendix and fails to state when he learned of this claim. Plaintiff also fails to state when or whether he ever contacted an EEO Counselor regarding this claim and does not state whether or how this claim can satisfy the continuing violation doctrine. Plaintiff fails to explain why this claim is not barred by res judicata and does not explain how the DOT and the FAA can be liable under Title VII for actions taken in their investigative, rather than employment, capacity.

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[98] The Court notes that in paragraph 7w. of the Third Amendment, plaintiff also improperly cites to his appendix.

Finally, plaintiff fails to explain how the alleged conduct was discriminatory or retaliatory.[99]

s. paragraph 7y of the third amended complaint

In this subsection, entitled "DOT/FAA abuse of alternate dispute resolution, ADR, program," plaintiff fails to state when he learned of this claim. Additionally, plaintiff does not state when or whether he ever contacted an EEO Counselor regarding the claim and fails to state whether or how the claim can satisfy the continuing violation doctrine. Plaintiff also fails to explain why this claim is not barred by res judicata and does not explain how the DOT and the FAA can be held liable under Title VII for actions taken in their conciliation, rather than employment, capacity. Finally, plaintiff fails to explain how the alleged conduct was

discriminatory or retaliatory.[100]

t. paragraph 7z of the third amended complaint

In this subsection, entitled "Denied assignment as contracting officers representative,

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[99] The Court notes this paragraph is also redundant of paragraphs 7e., 7f., and 7n. 28

[100] The Court notes this paragraph is also redundant of paragraph 7ee.

COR," plaintiff fails to state when he learned of this claim and does not state when or whether he ever contacted an EEO Counselor regarding the claim. Plaintiff also does not state whether or how this claim can satisfy the continuing violation doctrine. Plaintiff fails to explain why this claim is not barred by res judicata and does not explain how the alleged conduct was discriminatory or retaliatory. The Court also finds plaintiff fails to state a claim because the conduct alleged does not rise to the level of an adverse employment action.

u. paragraph 7aa of the third amended complaint

In this subsection, entitled "DOT/FAA's legitimate non discriminatory reasons, LNDR, are in, and of it's self, legal pretext for retaliation," plaintiff improperly cites to his appendix. Additionally, plaintiff describes evidence of pretext rather than a separate claim of retaliation or discrimination. The Court also notes the paragraph is redundant of large parts of plaintiff s second and third amendments.

v. paragraph 7bb of the third amended complaint

In this subsection, entitled "the hostile work environment created plaintiffs medical condition," plaintiff simply describes damages he allegedly sustained as a result of the hostile work environment claimed, and the paragraph does not state a separate claim for relief as it is redundant of large portions of the second and third amendment.

w. paragraph 7cc of the third amended complaint

In this subsection, entitled "hostile work environment resulted in plaintiff's constructive discharge," plaintiff fails to explain how the conduct in question was discriminatory or retaliatory and he alleges, in a conclusory manner, that he has satisfied the continuing violation doctrine without explaining or supporting his contention. Additionally, plaintiff fails to state a claim for which relief may be granted because there is no recognized cause of action under Title VII for failure to investigate earlier EEO complaints, let alone a claim of constructive discharge. Plaintiff also fails to state a claim upon which relief may be granted because the Fifth Circuit has not recognized a claim for a retaliatory hostile work environment. Finally, plaintiff fails to state a claim for which relief may be granted because all of the predicate acts which plaintiff alleges culminated in his alleged constructive discharge are barred by res judicata or by his failure to exhaust administrative remedies.[101]

x. paragraph 7dd of the third amended complaint

In this subsection, entitled "in violation of free speech clause of 1st Amendment to the Constitution

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[101] Plaintiff admits that he did not completely exhaust his administrative remedies when he alleges this particular complaint "is now in the administrative process."

of the United States of America, plaintiff denied testimony in a favorable light," plaintiff improperly cites to his appendix, fails to state when he learned of this claim, and does not state when or whether he ever contacted an EEO Counselor regarding the claim. Plaintiff also does not state whether or how this claim can satisfy the continuing violation doctrine and fails to explain why this claim is not barred by res judicata. Additionally, plaintiff does not explain how the DOT and the FAA can be held liable under Title VII for actions taken in their

investigative, rather than employment, capacity and he fails to explain how the alleged conduct was discriminatory or retaliatory.[102]

y. paragraph 7ee of the third amended complaint

In this subsection, entitled "informal EEO complaints that were wrongfully dismissed, or improperly processed, or ignored by the Agency," plaintiff improperly cites to his appendix, fails to state when he learned of this claim, and does not state when or whether he ever contacted an EEO Counselor regarding the claim. Additionally, plaintiff fails to state whether or how this claim can satisfy the continuing violation doctrine and does not

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[102] The Court notes that the claim is also redundant of paragraphs 7e., 7f., 7i., 7m., 7n., 7o., and 7q., and is frivolous because plaintiff cannot allege a First Amendment violation against federal actors.

explain why this claim is not barred by res judicata. Finally, plaintiff fails to explain how the DOT and the FAA can be liable under Title VII for actions taken in their investigative, rather than employment, capacity, and does not explain how the alleged conduct was discriminatory or retaliatory.[103]

z. paragraph 7ff of the third amended complaint

In this subsection, entitled "DOT/FAA issued official statements contrary to disciplinary actions," plaintiff fails to state when he learned of this claim, does not state when or whether he ever contacted an EEO Counselor regarding this claim, and fails to state whether or how this claim can satisfy the continuing violation doctrine. Plaintiff also fails to explain why this claim is not barred by res judicata or how the alleged conduct was discriminatory or retaliatory. Finally, the claim is redundant of paragraph 7p.

aa. paragraph 7gg of the third amended complaint

In this subsection, entitled "DOT/FAA issued statements in direct evidence of retaliation," plaintiff merely recites evidence in support of his other claims. Additionally, plaintiff does not state a

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[103] The Court also finds that this subsection is redundant of paragraphs 7e., 7f., 7i., 7m., 7n., 7o., and 7q.

separate claim for relief. The claim is also redundant of paragraphs 7 d. and 7p.

3. conclusion

Plaintiffs second and third amendments do not state a claim for which relief can be granted and do not comply with the Court's September 29, 2006 Order. The Court agrees with defendant that plaintiff does not satisfy the requirements of Rules 8 and 10 of the Federal Rules of Civil Procedure as he does not provide the defendants with sufficient information upon which to base an appropriate answer or other response.[104] In other words, plaintiff, in his second and third amendments, was required to provide enough detail and background

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[104] Rule 8(a) of the Federal Rules of Civil Procedure provides:
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends ... , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 10(b) of the Federal Rules of Civil Procedure provides:
(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

information for defendant to understand how and why plaintiff believes that defendant has wronged him.

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Plaintiff has not done this and seems determined to continue to present stale claims, claims that have not been administratively exhausted, claims that are barred by res judicata, or claims that simply do not rise to the level of a Title VII violation.

Defendant is obviously upset with the circumstances surrounding his employment with defendant, as evidenced by the lawsuits he filed in 1998 and 2002 against the Department of Transportation and Federal Aviation Administration.[105] Plaintiff's conclusory allegations and legal conclusions masquerading as factual conclusions, however, cannot suffice to prevent defendant's motion to dismiss in this case.[106] Rule 12(b)(6) authorizes a dismissal of a complaint for "failure to state a claim upon which relief can be granted."[107] The Court has given plaintiff ample opportunity, as a pro se litigant, to cure his pleading deficiencies and has provided plaintiff with specific instructions regarding the manner in which plaintiff must amend his pleading to state a claim for which

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[105] See Arizpe, et alia v. Mineta, et alia, 5:02-CV-115-FB filed Feb. 5,2002 and Arizpe v. Slater, et alia, 5:98-CV-61O-0LG, filed Jul. 9,1998.

[106] United States ex rel. Bain v. Georgia Gulf Corp., 386 F.3d 648,654 (5th Cir. 2004).

[107] FED. R. CIV. P. 12(b)(6).

relief may be granted. Plaintiff's second and third amendments lack the specific information required to move this case forward, and it appears beyond doubt that plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief in this case.[108] Therefore, plaintiff's motion to dismiss should be granted.

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4. miscellaneous motions

On January 5, 2007, plaintiff filed a "motion for inclusion of current administrative EEO Complaint DOT-2006-20531-FAA-05 and plaintiff's motion for court order for DOT to complete investigation, produce an ROI, and agency discrimination determination of EEO Complaint DOT-2006-20531-FAA-05,"[109] in addition to a "motion for spouse and two daughters to join as additional plaintiffs."[110] Plaintiff's motion for inclusion of current administrative EEO Complaint and for a court order does not provide the Court with any documentation indicating the Department of Transportation has failed to complete any EEO investigations and instead rests of plaintiff's conclusory allegations. Additionally, plaintiff

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[108] Additionally, the Court's September 29, 2006 Order specifically cautions plaintiff that his failure to comply with the Order for more definite statement and show cause Order may result in some or all of his claims being dismissed. See docket no. 26 at 16.

[109] Docket no. 50.

[110] Docket no. 51.

essentially admits in the motion that he has not exhausted all of his administrative remedies prior to the filing of this lawsuit, his third against the Department of Transportation in the past nine years. Further, there is no information that would allow the Court to conclude that the allegations addressed in the current, on-going administrative proceedings would not be time-barred in this Court. Thus, plaintiff's motion should be denied.

Similarly, plaintiffs motion for his spouse and two daughters to be joined as plaintiffs should be denied. Plaintiffs motion alleges that his wife, Irma Arizpe, and his daughters, lliana Rommel and Laura Anna Miller, are entitled to an award of $8.25 million in damages as an award on plaintiff's Title VII claims against defendant in this law suit. Plaintiff fails to identify how Ms. Azripe and plaintiffs two daughters have standing in this case. The motion does not allege specific grounds by which plaintiffs family can recover under Title VII, but does allude to

mental anguish. The motion does assert that plaintiffs wife and two daughters have suffered a negative impact due to plaintiffs own employment, past employment, or dealings with his employer. Title 42, United States Code, § 2000e-5(g) provides that a plaintiff who is successful under Title VII may recover equitable relief, such as an injunction against the unlawful employment practice, or affirmative action including, but not limited to, reinstatement with or without back pay. In Bennett v. Corroon &

Black Corp.,[111] the Fifth Circuit Court of Appeals specifically found that mental anguish damages are not recoverable under Title VII. Further, as this report recommends that plaintiffs remaining claims be dismissed for failure to state a claim, plaintiffs motion to join additional plaintiffs is moot, to the extent it should not be denied as frivolous.

C. Sanctions

Arguing plaintiff's claims are frivolous, defendant has requested that sanctions be imposed against plaintiff.[112] Given plaintiff's litigation history,[113] defendant argues "by his actions in continuing to assert claims which have been finally dismissed, by his actions in disobeying the Court's Orders with respect to pleading his case, by his actions in asserting frivolous claims, and by his actions in refusing to provide specific information requested by the Court, plaintiff has demonstrated that he should be subject to monetary sanctions, and/or other

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[111] 845 F.2d 104, 106 (5th Cir. 1988).

[112] Docket no. 37 at 20-24.

[113] See Arizpe, et alia v. Mineta, et alia, 5:02-CV-115-FB, filed Feb. 5,2002 (dismissal aff'd by Fifth Circuit mandate issued on Jul. 16, 2003, in appeal no. 02-50948) and Arizpe v. Slater, et alia, 5:98-CV-610-0LG, filed Jul. 9,1998 (dismissal aff'd by Fifth Circuit mandate issued on Jul. 28, 2000, in appeal no. 99-50931).

sanctions to prevent further waste of resources and expense to the taxpayers."[114] In response, plaintiff argues the request is an example of the executive branch attempting to manipulate the judicial branch into continuing the executive branch's "decade long official oppression."[115]

Rule 11, Federal Rules of Civil Procedure, provides, in pertinent part, that when presenting the court with a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that:

> to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

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[114] Docket no. 37 at 24.

[115] Docket no. 44 at 2.

> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
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> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.[116]

A court may, after finding a violation of this section, and after giving notice and a reasonable opportunity to respond, impose sanctions on the attorney or unrepresented party.[117] Sanctions shall be limited to what is sufficient to deter the conduct from happening again, and

may be monetary or nonmonetary in nature.[118] In determining whether a Rule 11 violation has occurred, the court uses an objective standard of reasonableness under the circumstances, and an attorney's good faith will not save him from Rule 11 sanctions.[119] Rule 11 applies to pro se litigants just as it does to attorneys, but a litigant's pro se status

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[116] FED. R. CIV. P. 11(b).

[117] Id. at 11(c).

[118] Id. at 11(c)(2).

[119] Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988).

can be considered by the court in determining whether a reasonable inquiry into the underlying legal basis of a claim has been made.[120] Once a court determines that a party has violated Rule 11, sanctions are mandatory,[121] but a court retains broad discretion in determining the nature and amount of the sanctions to be to be imposed.[122]

In this case, the claims in plaintiffs complaint, and each of its amendments, contain claims against defendant that are not warranted by existing law, outdated, and frivolous. The Court finds plaintiff has violated Rule 11 and sanctions are appropriate. Plaintiff has attempted to relitigate discrimination claims which have been adjudicated in previous lawsuits, and found to be time-barred, procedurally barred, frivolous, or not warranted by law or the facts. The undersigned finds no reason to reject defendant's assessment that plaintiff "apparently will never accept" that his claims have been "finally adjudicated unless and until he is victorious."[123] After

considering Arizpe's abuse of the judicial process both in this case and in past cases,[124] the Court

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[120] Id. at 875.
[121] Id. at 876.
[122] Id. at 877.
[123] Docket no. 37 at 23.
[124] See Arizpe, et alia v. Mineta, et alia, 5:02-CV-115-FB, filed Feb. 5, 2002 and Arizpe v. Slater, et alia, 5:98-CV-610-OLG, filed Jul. 9, 1998.

recommends that plaintiff be enjoined from filing in this Court any paper relating to his employment with the Department of Transportation unless he first obtains leave of this Court after demonstrating that his claim is timely, was exhausted (if applicable), and is not barred by res judicata, collateral estoppel or other legal doctrine. Although the Court does not now recommend the imposition of monetary sanctions on Arizpe, plaintiff is hereby advised that the District Judge may determine - in this case or in connection with any future papers filed in this court - that monetary sanctions should be imposed and plaintiff should be required to pay to sums equal to costs and legal fees incurred to defend against claims that were previously asserted, dismissed, and then re- filed. If plaintiff is not otherwise aware, he should understand that attorney's fees alone could equal thousands of dollars.

VI. RECOMMENDATION

Based on the foregoing analysis, it is recommended that defendant's motion to dismiss[125] be **GRANTED** and plaintiff's remaining claims in this suit be **DISMISSED with prejudice**. Additionally, plaintiff's "motion for inclusion of current administrative EEO complaint DOT-2006-20531-FAA-05 and plaintiff's motion for court order for DOT to complete investigation, produce an ROI, and agency discrimination determination of EEO complaint DOT -2006-20531-

[125] Docket no. 37.

FAA-05,"[126] and "motion for spouse and two daughters to join as additional plaintiffs"[127] should each be **DENIED**. It is also recommended that defendant's request for sanctions be **GRANTED** and Arizpe should be enjoined from filing in this Court any paper relating to his employment with the Department of Transportation unless he first obtains leave of this Court after demonstrating that his claim is timely, was exhausted (if applicable), and is not barred by res judicata, collateral estoppel or other legal doctrine. Any and all other pending motions or requests for relief should be **DENIED**.

VII. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either: (l) electronic transmittal to all parties represented by an attorney registered as a Filing User with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) by certified mail, return receipt requested, to any party not represented by an attorney registered as a Filing User.

As provided in 28U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), any party who desires to object to this Report must file with the District Clerk and serve on all parties and the Magistrate Judge written

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[126] Docket no. 50.

[127] Docket no. 51.

Objections to the Report and Recommendation within 10 days after being served with a copy, unless this time period is modified by the District Court. A party filing Objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous,

conclusive or general objections.

A party's failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the party from receiving a de novo determination by the District Court.[128] Additionally, a party's failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.[129]

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[128] See Thomas v. Am, 474 U.S. 140, 150, 106 S.Ct. 466, 472 (1985).

[129] Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000); Douglass v. United Servo Auto. Ass'n., 79 F.3d 1415, 1428 (5th Cir.1996).

SIGNED and **ENTERED** this 12th day of January, 2007.

s/ Pamela A. Mathy
PAMELA A. MATHY
UNITED STATES MAGISTRATE JUDGE

CONSTITUTION, STATUTES, and REGULATIONS in REVIEW

* U.S. Constitution Article III, Sec. 1: "The judicial Power of the United States, shall be vested in one supreme Court..." Sec. 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...--- to Controversies to which the United States shall be a Party... In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact..."

* U.S. Constitution Article VI: "[a]ll executive and judicial officers, ... of the United States..., shall be bound by Oath or Affirmation, to support this Constitution..."

* U.S. Constitution Amendment I: "Congress shall make no law... [a]bridging the freedom of speech", and "[r]ight of the people peaceably to assemble, and petition the Government for a redress of grievances."

* U.S. Constitution Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

* U.S. Constitution Amendment XIV: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* Civil Rights Act of 1964, 42 USC, *(Pub. Law 88-352)*, and Amended Civil Rights Act of 1991, *(Pub. Law 102-166)*; CRA.

Sec. 2000e-3(a). [Section 704]
"It shall be an unlawful employment practice for an employer to discriminate against any of his employees ..., to discriminate against any individual, ..., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Title VII, 2000e-2 (n) (2)-(D):
"(2) Nothing in this subsection shall be construed to-
(D) authorize or permit the denial to any person of the due process of law required by the constitution."

Title VII, 2000e-16(e). (Section 717)
Employment by Federal Government: "Nothing contained in this act shall relieve any Government agency or official of its or his primary responsibility to assure non discrimination in employment as required by the Constitution and statutes or of its or

his responsibilities under Executive Order 11478 relating to equal employment opportunity in the federal Government."

* Age Discrimination in Employment Act of 1967, ADEA, (*Pub. Law 90-202*)

29 USC; Sec. 623(a): "It shall be unlawful for an employer- (1)..., to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;..."

29 USC; Sec. 623(d): "It shall be unlawful for an employer to discriminate against any of his employees ..., because such individual, ... has opposed any practice made unlawful by this section, or because such individual, ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."

* Federal Rules of Civil Procedure:

Rule 8(a); "Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the

grounds upon which the court's jurisdiction depends ... , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

Rule 10(b); "Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

* 29 Code of Federal Regulation, CFR, Part 1614.101(b); "No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act ..., the Age Discrimination in Employment Act ..., or for participating in any stage of administrative or judicial proceedings under those statutes."

STANDARD FORM 61
OMB APPROVAL NO. 50-R118
REVISED SEPTEMBER 1970
U.S. CIVIL SERVICE COMMISSION
F.P.M. Chapter 295 61-108

APPOINTMENT AFFIDAVITS

General Facilities & Equipment Technician 11/24/75
(*Position to which appointed*) (*Date of appointment*)

DOT, Federal Aviation Admin. Airway Facilities Div.
(*Department or agency*) (*Bureau or Division*)
Corpus Christi, Texas
(*Place of employment*)

I, Richard Arizpe, do solemnly swear (or affirm) that-

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

s/ Richard Arizpe
(Signature of appointee)

Subscribed and sworn (or affirmed) before me this 24th day of November A.D. 19 75,
at Corpus Christi Texas
(City) *(State)*

s/ C. D. Harr
[SEAL] C. D. HARR,
(signature of officer)

Commission Expires
Manager, Airway Facilities Sector
(Title)
(If by a Notary Public, the date of expiration of his/her Commission should be shown)

NOTE.-*The oath of office must be administered by a person specified in 5 U.S.C. 2903. The words "So help me God" in the oath and the word "swear" wherever it appears above should be stricken out when the appointee elects to affirm rather than swear to the affidavits; only these words may be stricken and only when the appointee elects to affirm the affidavits.*

GPO:

1970 O – 408-925

000865

Memorandum

U.S. Department
Of Transportation
Federal Aviation
Administration

Subject: INFORMATION: Race, National Origin, and Gender Data

Date: AUG 2 6 1997

From: Assistant Administrator for Civil Rights, ACR-1

Reply to Attn of:

To: Associate Administrator for Administration, AAD-1
Regional Administrators
Center Directors
THRU: Civil Rights Officers

Questions have arisen concerning the collection and maintenance of data regarding individual's race, nationa1 origin, and gender. The recorded information is a matter of privacy. It may not be revealed without the individual's express consent. The information is gathered via the *Race and National Origin Identification* Standard Form (SF-181) upon application or employment with the government. In accordance with 29 CFR 1614, the information is only to be reported as group statistics and used in studies and analysis related to affirmative action or equal employment opportunity (EEO). Nothing specifically identifying a person's

code is to be maintained such that it might influence personnel actions or violate the individual's privacy.

Automated record systems require additional safeguarding of the individual's privacy. The FAA recognized this in Order 1400.8 when it designated the EEO Officer as the custodian of the codes as minority group designations, were noted. As such, only the EEO or Civil Rights Officer shall control the data. Anyone else must have written authorization detailing how the information will be used.

The official and only information on race, national origin, or gender should be found in the agency personnel information system and its use or access known to the Civil Rights Officer. Any other records should be surrendered to the Civil Rights Officer for disposal. If there are any questions about the accuracy of the official information in the personnel information system, that information may only be reviewed and modified by the individual.

Attached are excerpts from the cited sources. If you have any questions, please contact Dr. Duke Taylor at 202-267-3271 or via cc-Mail.

s/Mary N. Whigham Jones
for Fanny Rivera

Attachment

Memorandum

U.S. Department
Of Transportation
Federal Aviation
Administration
400

Subject: INFORMATION: Employee Testimony and Production of Records in Legal Proceedings

Date: MAR 11 1993

From: Acting Chief Counsel

Reply to Attn of:

To: AMT Members

The Department of Transportation has published new rules applicable to the testimony of departmental employees and the production of records in legal proceedings. The rules are published at 49 CFR Part 9, and they were effective on March 4, 1993. Here is a brief summary of the rules, which you may wish to share with your employees.

Under the new rules a "legal proceeding" is defined to include any matter pending before any federal, state or local court and any federal, state or local administrative proceeding. "Testimony" is defined to include any written or oral statement and includes depositions and affidavits in a legal proceeding.

The rules require that when an employee receives a request to testify as an FAA employee in private litigation he/she must notify agency counsel immediately. In addition, the rules provide that requests for production of agency records should be submitted directly to agency counsel. If an employee receives a request to produce records he/she should contact agency counsel immediately.

The rules also provide that in proceedings involving the United States, an employee may testify as to facts and may give opinion testimony only on behalf of the United States. In private litigation (i.e., where the U.S. is not a party) an employee may testify only as to facts within his/her personal knowledge, must decline to answer questions calling for facts beyond the scope of his/her official duties, and may not testify as to facts that are otherwise available to the private litigant in an official report.

The new rules contain numerous other specific requirements not mentioned here. Any questions about them may be directed to your regional or center counsel, or to the Assistant Chief Counsel for Litigation.

CY BR/STAFFS

s/ John H. Cassady
John H. Cassady

MAR 16 1993